No. 14-185

IN THE

Supreme Court of the United States

NOEL REYES MATA,

Petitioner,

v.

ERIC H. HOLDER, JR.,
ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

On Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE

Amicus National Immigrant Justice Center (NIJC) is a non-profit agency that represents immigrants and asylum-seekers. NIJC collaborates with more than 1500 pro bono attorneys to represent thousands of immigrants and asylum-seekers annually. NIJC has represented numerous individuals seeking equitable tolling in order to seek reopening of their cases, many due to ineffective assistance of counsel. NIJC has also represented individuals seeking reopening under the residual reopening authority of 8 C.F.R. § 1003.2(a).[1]

SUMMARY OF THE AMICUS ARGUMENT

The Court should decide in favor of the petitioner in this case by holding that equitable tolling determinations are not made under the Board's residual or *sua sponte* reopening authority. Equitable tolling functions by altering when a particular limitations period begins and ends. As both parties note, the Fifth Circuit misapprehended the nature of equitable tolling in this context, and its finding that it lacked jurisdiction was based on that misanalysis. The Court need go no further to resolve this case.

We write in order to address a related matter adverted to in the government's brief. The unpublished decision below held, and the government's brief now argues, that jurisdiction is precluded, as a blanket matter, over the BIA's refusal to exercise its residual

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[1] Pursuant to Rule 37.6 of the rules of this Court, amicus affirms that no counsel for a party authorized this brief in whole or in part and that no person other than amicus and their counsel made a monetary contribution to its preparation or submission. The parties' letters of consent to this filing have been submitted to the Clerk.

regulatory authority to reopen a case *sua sponte*,[2] because "no judicially manageable standards exist for reviewing such a decision." U.S. Br. 35 n.13 (citing 5 U.S.C. § 701(a)(2)). We respectfully submit that the matter is not so straightforward. First, the Court has never held, and should not now hold, that the detailed jurisdictional scheme in the immigration statutes is displaced by the general jurisdictional rules of the Administrative Procedures Act. Second, the BIA does address legal and constitutional claims in the context of a *sua sponte* reopening decision. Even if background "no law to apply" principles may bar jurisdiction in the removal context, such claims (and potentially others that may be raised in that context) plainly present manageable legal principles. Accordingly, the Court should decline to prejudge a broad issue that it wisely left open in *Kucana*, the resolution of which is not required by this case. *See Kucana v. Holder*, 558 U.S. 233, 252 (2010).

ARGUMENT

I. EQUITABLE TOLLING DETERMINATIONS ARE NOT MADE UNDER THE BOARD'S *SUA SPONTE* AUTHORITY.

The primary issue in this case is whether the Fifth Circuit erred in ruling, contrary to ten circuits, that equitable tolling determinations should be "construed" as arising under the Board's *sua sponte* authority. As the Petitioner and Respondent argue, the

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[2] Courts frequently refer to this authority as "*sua sponte*" reopening authority or authority to reopen on the Board's own motion. This is something of a misnomer, since *sua sponte* reopening is generally invoked at the request of a party. However, for sake of clarity, this brief discusses that authority employing the terminology generally used by courts of appeals.

Court should reject the Fifth Circuit's analysis and follow the logic of the other ten circuits that have held equitable tolling determinations to be outside the Board's *sua sponte* authority. Pet'r's Br. 14; U.S. Br. at 28.

Equitable tolling is a general legal concept that has been employed in this country since at least 1804. *See Jones v. Conoway*, 4 Yeates 109 (Pa. 1804) (applying the doctrine of equitable tolling in a slavery case); *Sherwood v. Sutton*, 21 F. Cas. 1303 (C.C.D.N.H. 1828) (No. 12,782) (Story, J., in circuit).

By nature and definition, tolling acts "to suspend or stop temporarily," Black's Law Dictionary 1334 (5th ed. 1976). Thus, under traditional tolling principles, the "statutes of limitations ... shall not begin to run until" the end of the circumstance causing the tolling. *Exploration Co v. United States*, 247 U.S. 435, 449 (1918); *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 348 (1875); ("[T]he bar of the statute does not begin to run until the fraud is discovered."). Tolling is not an exception to a statutory deadline; rather, it governs the "clock" applicable to such a deadline. It is logical to say that the 90 day reopening deadline can be tolled; whereas there is no deadline for the Board's residual reopening authority, and it makes no sense to say that one can toll a nonexistent deadline.

The Court need go no further to resolve this case.

II. CONGRESS' DETAILED JURISDICTIONAL RULES FOR LEGAL AND DISCRETIONARY IMMIGRATION MATTERS SHOULD GOVERN IN THIS CONTEXT.

The immigration statute includes a detailed elaboration of federal court jurisdiction over removal orders. In this context, background administrative law principles are supplanted by more specific jurisdictional rules. For this reason, the Court should hesitate to import general jurisdictional limitations into the removal order context.

A. Immigration-Specific Jurisdictional Rules Are Detailed and On Point.

The Solicitor General submits that "review of final orders of removal is governed by the background principles" of the Administrative Procedures Act, including 5 U.S.C. § 701(a)(2). U.S. Br. at 16. But it is not at all apparent that a separate jurisdictional analysis should be required under § 701(a)(2), where Congress has enacted specific jurisdictional rules governing discretionary matters in the immigration context. In another context, the Court has found that where Congress has adopted "exception[s] to the general applicability of the Hobbs Act procedures ... it must be construed as creating a procedure different from normal practice under the Act." *Stone v. INS*, 514 U.S. 386, 397 (1995); *see also Marcello v. Bonds*, 349 U. S. 302, 310 (1955).

The INA not only includes a specific, detailed statutory scheme governing immigration appeals generally, *see* 8 U.S.C. § 1252, but Congress enacted specific statutory rules governing judicial review of discretionary matters. 8 U.S.C. §§ 1252(a)(2)(B); (a)(2)(D). Under the INA, courts first ask whether the matter

at issue is a discretionary matter related to one of five enumerated discretionary matters. 8 U.S.C. § 1252(a)(2)(B)(i). If not, courts ask whether it relates to a matter "specified under this subchapter to be in the discretion of the Attorney General," other than asylum. *Id.* § 1252(a)(2)(B)(ii). If either § 1252(a)(2)(B)(i) or (ii) is implicated, federal court jurisdiction is not plenary; but even then, Congress permits review over legal and constitutional questions. *Id.* § 1252(a)(2)(D).

These provisions are part of "a precisely drawn, detailed statute" governing jurisdiction over discretionary matters, which "pre-empts more general" rules. *Hinck v. United States*, 550 U.S. 501, 506 (2007) (quoting *EC Term of Years Trust v. United States*, 550 U.S. 429, 434 (2007) (internal quotation marks omitted).

In light of the detailed and specific jurisdictional scheme in the INA, it is at best doubtful that the general provisions of § 701(a)(2) govern; "it is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). That canon of construction is "particularly true where... 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RedLAX Bank Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 519 (1996) (Thomas, J., dissenting).

Sections 1252(a)(2)(B) and (D) are specifically applicable to discretionary agency decisions in the removal context. They are part of "a comprehensive scheme" which "deliberately target[s] specific prob-

lems with specific solutions." *RedLAX*, 132 S. Ct. at 2071. These specific rules should govern over more general principles.

The Court addressed § 1252(a)(2)(B)(ii) in *Kucana v. Holder*, 558 U.S. 233 (2010). Therein, the Court held that § 1252(a)(2)(B)(ii) only precludes review over those matters specified as discretionary by statute. Under *Kucana*, where Congress's carefully calibrated judicial review scheme prohibits judicial review, no judicial review is available. Where Congress has not prohibited review, it continues to be available. It is black letter law that where jurisdiction is granted by Congress, and the requirements of Article III standing are met, courts have a "virtually unflagging obligation" to adjudicate the matters that come before them. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see also Cohens v. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").

Moreover, the approach advocated by the Government would be inconsistent with *Kucana* to some extent. The Solicitor General argues that courts lack jurisdiction over residual reopening decisions, because Board case law does not provide a sufficiently clear framework to permit federal judicial review. U.S. Br. 35, n.13 (citing *Kucana*, 558 U.S. at 251, n.18).

However, it is clear, as the Government does not contest, that judicially manageable standards may be found in formal and informal policy statements and regulations as well as in statutes. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410

(1971). Thus, under the Government's approach, the Board would be able to create or contract federal court jurisdiction over residual reopening matters by increasing or decreasing the clarity of its precedent. [3]

Thus, under the approach advocated by the Solicitor General, "the Executive would have a free hand to shelter its own decisions from abuse-of-discretion appellate court review." *Kucana*, 558 U.S. at 252. *Kucana* rejected the suggestion that agencies should be able by regulation or case law to alter federal court jurisdiction as "an extraordinary delegation of authority." *Id.* Yet under the government's reasoning, that which the INA does not permit may be accomplished under § 701(a)(2).

The potential inconsistency does not stop there. To the extent that § 701(a)(2) principles were found applicable to discretionary immigration matters, and a particular discretionary matter were found to qualify, courts would then need to undertake a second, separate analysis to decide whether jurisdiction over non-discretionary matters is permitted in that context. The answer to that question may be disputed. *Cf. Anaya Aguilar v. Holder*, 683 F.3d 369, 372 (7th Cir. 2012) (finding jurisdiction over *sua sponte* matters precluded except for statutory and constitutional questions) *with Gor v. Holder*, 607 F.3d 180, 193 (6th Cir. 2010) (finding jurisdiction over *sua sponte* matters precluded even for statutory and constitutional questions).

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[3] Amicus sees no limiting principle which would prevent the Board from similarly insulating other discretionary matters from abuse-of-discretion review, simply by refusing to issue any rules elaborating on that authority.

Particularly in light of the general presumption "favoring interpretations of statutes [to] allow judicial review of administrative action," *Reno v. Catholic Social Services, Inc.*, 509 U.S. 43, 63-64 (1993) (quoting *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991)), the Court should be leery of the Solicitor General's argument. Jurisdiction-stripping statutes should be read narrowly, not broadly. *See Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995); *INS v. St. Cyr*, 533 U.S. 289, 298 (2001).

B. *Sua Sponte* Matters Frequently Raise or Involve legal issues.

Even if it were accepted that there is no law to apply to the discretionary aspects of *sua sponte* decisions, many *sua sponte* decisions involve legal and constitutional issues. These can include changes in law, vacatur of convictions, agency error in the reopening analysis, and other legal and constitutional questions.

1. Longstanding Agency Policy Permits *Sua Sponte* Reopening for Changes in Law.

The Board has a longstanding rule that even where an order was proper at the time it was entered, a noncitizen should not be removed on the basis of an order whose legal foundations have been undermined by intervening law. *See Matter of Farinas*, 12 I. & N. Dec. 467, 472 (BIA 1967).

For instance, in *Farinas*, a noncitizen was ordered deported in 1946 on the ground that he had effectuated an entry to the United States when he transferred ships at a Canadian port while traveling between Washington State and Alaska. *Id.* at 468. Subsequent to the entry of the deportation order, but pri-

or to its execution in 1950, this Court's decision in *Delgadillo v. Carmichael*, 332 U.S. 388 (1947), made clear that Farinas had not in fact made an "entry" into the United States when he transferred ships. Accordingly, Farinas "was not properly subject to deportation." *Farinas*, 12 I. & N. Dec. at 473. The Board held that "neither the finding of deportability nor the order of deportation is clothed with the armor of immunity from attack while the alien is still in the United States and before the order of deportation is executed," *id.* at 471, and granted *sua sponte* relief. *See also Matter of Malone*, 11 I. & N. Dec. 730, 732 (BIA 1966); *Matter of Bowe*, 17 I. & N. Dec. 488 (BIA 1981) (reopening *sua sponte* in light of circuit authority rejecting Board's legal position).

Amicus seeks neither to challenge nor support the Board's approach, which has some support elsewhere in the law. *Cf. United States v. Grubbs*, 547 U.S. 90, 96 n.2 (2006) (government may not execute a search warrant if, subsequent to issuance but prior to execution, the government comes to understand that probable cause was lacking). Rather, the point is that the Board may adopt rules in this context that are legal in nature and that may therefore be reviewed for legal error, even if the Board describes its decision as one issued under its residual reopening authority.

2. *Sua Sponte* Reopening is Employed Where Convictions Are Vacated On Constitutional or Legal Grounds.

Another area that frequently requires the use of *sua sponte* reopening is that of vacated convictions. Criminal convictions may render noncitizens removable from the United States. *See* 8 U.S.C. §

1227(a)(2) (listing multiple criminal grounds of removability). Where a conviction is later held unlawful or improper, noncitizens may ask the agency to revisit the resulting removal order.

The Board has long utilized its residual reopening authority to reopen where an underlying conviction is found invalid after the expiration of the reopening period. *See Cruz v. Att'y Gen. of U.S.*, 452 F.3d 240, 246, n.3 (3d Cir. 2006) ("The parties have not identified, and we have not found, a single case in which the Board has rejected a motion to reopen as untimely after concluding that an alien is no longer convicted for immigration purposes.").[4]

That said, within that context, it is sometimes unclear whether the underlying conviction should be considered as vacated, or not. The Board has issued a number of cases elucidating its approach to that determination. *See Matter of Roldan*, 22 I. & N. Dec. 512, 528 (BIA 1999); *Matter of Rodriguez-Ruiz*, 22 I. & N. Dec. 1378 (BIA 2000); *Matter of Adamiak*, 23 I. & N. Dec 878 (2006). The Board's rule in the reopening context, *see Matter of Chavez-Martinez*, 24 I. & N. Dec. 272 (BIA 2007), has been disapproved in the Sixth and Ninth Circuits. *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Pickering v. Gonzales*, 465 F.3d 263, 270 (6th Cir. 2006).

Again, Amicus's point is not that the Board's approach is correct, in whole or in part; but rather that the Board has adopted a set of legal standards that

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[4] The circumstance of a conviction vacated after the removal order would almost invariably involve "facts which, through no fault of [the noncitizen], the original proceeding did not contain." *Cf. ICC v. Locomotive Engineers*, 482 U.S. 270, 279 (1987)

may be reviewed for legal error. *See Negusie v. Holder*, 555 U.S. 511, 516 (2009).

3. The Board's Exercise of *Sua Sponte* Authority May Turn on Legal Factors Such as the Board's View of Its Powers.

The Board's exercise of its *sua sponte* authority is also influenced by its understanding of its own jurisdiction and powers. The scope of the Board's reopening authority has often been at issue in recent years because in some cases, the Board has authority to order removal while the Department of Homeland Security (DHS) is authorized to grant relief from removal. *See, e.g., Matter of Yauri*, 25 I. & N. Dec. 103 (BIA 2009) (denying reopening where residency application could only be directed at DHS under 8 C.F.R. § 1245.2(a)(1)(ii)); *Matter of Hashmi*, 24 I. & N. Dec. 785 (BIA 2009) (setting forth considerations for granting a continuance while related matter is pending before DHS).

The BIA takes the position that it "ha[s] not been granted authority to reopen the proceedings of respondents ... to pursue matters that could affect their removability if we have no jurisdiction over such matters." *Yauri*, 25 I. & N. Dec. at 110. The Board's approach has been rejected by the Second, Seventh, Eighth, and Ninth circuits. *Singh v. Holder*, 771 F.3d 647, 653 (9th Cir. 2014); *Freire v. Holder*, 647 F.3d 67, 71 (2d Cir. 2011); *Clifton v. Holder*, 598 F.3d 486, 493 (8th Cir. 2010); *Potdar v. Mukasey*, 550 F.3d 594, 594 (7th Cir. 2008); *Ceta v. Mukasey*, 535 F.3d 639, 648 (7th Cir. 2008); *Ni v. BIA*, 520 F.3d 125, 130–32 (2d Cir. 2008); *Kalilu v. Mukasey*, 516 F.3d 777, 780 (9th Cir. 2008); *but see Scheerer v. U.S. Att'y General*,

513 F.3d 1244 (11th Cir. 2008) (deferring to Board's approach).

Amicus agrees with the circuit majority that the Board's approach is incorrect; but either way, this issue presents a clear instance of a legal determination arising in the *sua sponte* reopening context. Federal courts have competence to determine such legal claims even if the Board frames decisions in terms of its *sua sponte* reopening authority.

C. Even If No Law to Apply Principles Were a Bar to Judicial Review Here, They Would Not Bar Questions of Law or Constitutional Questions, as the Majority of Circuits Agree.

In the *Kucana* decision, the Court left open the question of whether and when federal courts could review denials of *sua sponte* reopening. 558 U.S. at 251, n.18. Although, as the Court noted, many Courts of Appeals have found their jurisdiction barred where they perceived "no law to apply," under 5 U.S.C. § 701(a)(2), the vast majority of the Courts of Appeals have reviewed denials of *sua sponte* reopening that involved questions of law and constitutional questions.

Most courts of appeals have held that review is available for constitutional and statutory questions. *See, e.g.*, *Rosario v. Holder*, 627 F.3d 58, 61 (2d Cir. 2010) (permitting review of "all constitutional claims or questions of law raised by the BIA's exercise of its discretion") (quotations omitted); *Luis v. INS*, 196 F.3d 36, 41 (1st Cir. 1999) ("This court has jurisdiction to review Luis's due process claim.") (citing *Bernal-Vallejo v. INS*, 195 F.3d 56, 64 (1st Cir. 1999)); *Cruz*, 452 F.3d at 246 (finding jurisdiction to review a

denial when an underlying conviction had been vacated would be present); *Nawaz v. Holder*, 314 F. App'x 736, 737 (5th Cir. 2009) ("While we do not have jurisdiction to consider Nawaz's non-constitutional challenges to the BIA's refusal to reopen his removal proceedings *sua sponte*, we retain jurisdiction to consider constitutional challenges that were raised before the BIA."); *Anaya Aguilar*, 683 F.3d at 372 ; *Tamenut v. Mukasey*, 521 F.3d 1000, 1005 (8th Cir. 2008) (en banc) ("Although this court lacks jurisdiction over Tamenut's challenge to the BIA's decision not to reopen *sua sponte*, we generally do have jurisdiction over any colorable constitutional claim."); *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102, 1106-7 (9th Cir. 2006) (jurisdiction to review is present where a " 'key part' of the government's case [for] removal," is challenged); *Lenis v. U.S. Att'y Gen.*, 525 F.3d 1291, 1294 n.7 (11th Cir. 2008) ("[A]n appellate court may have jurisdiction over constitutional claims related to the BIA's decision not to exercise its *sua sponte* power.").

As the First Circuit reasoned in *Bernal-Vallejo*, "a due process argument does not involve a matter that Congress committed to agency discretion." 195 F.3d at 64. Just as courts analytically isolate constitutional and legal claims from abuse-of discretion claims in other contexts, see Br. of Resp. at 22, n.7, there is no reason why courts should not do the same for claims of legal error and constitutional claims in the *sua sponte* context.

Only the Sixth and possibly the Fourth circuits have taken the position that cases involving constitutional or statutory questions could not be reviewed for denials of *sua sponte* reopening. *Gor*, 607 F.3d at

193; *Barry v. Mukasey*, 524 F.3d 721, 724 (6th Cir. 2008); *Harchenko v. INS*, 379 F.3d 405, 409 (6th Cir. 2004); *see also Mosere v. Mukasey*, 552 F.3d 397, 400 (4th Cir. 2009).

In Amicus's view, those circuits err. Insulating legal error from review because it arises in relation to a discretionary calculus is plainly inconsistent with *St. Cyr*, 533 U.S. at 307-08 (distinguishing between "[e]ligibility ... governed by specific statutory standard" and "the actual granting of relief [that is] not a matter of right under any circumstances, but rather is in all cases a matter of grace"). *See also INS v. Cardoza-Fonseca*, 480 U.S. 421, 443-44 (1987) (distinguishing between discretion as to the ultimate decision and the criteria for eligibility for relief).

There is always "law to apply" in reviewing a constitutional or legal question. *UAW v. Brock*, 783 F.2d 237, 245-46 (D.C. Cir. 1986) ("[I]t seems almost ludicrous to suggest that there is 'no law to apply' in reviewing whether an agency has reasonably interpreted a law."); *see also, Diebold v. United States*, 947 F.2d 787, 798 (6th Cir. 1991) (The constitution or law itself would "provide standards by which to judge an agency's ... decision."); *Davis Enters. v. EPA*, 877 F.2d 1181, 1185-86 (3d Cir. 1989); *Electricities of N.C., Inc. v. Southeastern Power Admin.*, 774 F.2d 1262, 1267 (4th Cir. 1985); *Woodsmall v. Lyng*, 816 F.2d 1241, 1246 (8th Cir. 1987); *Montana Air Chapter No. 29, Ass'n of Civilian Technicians v. Fed. Labor Relations Auth.*, 898 F.2d 753, 756-57 (9th Cir. 1990).

Moreover, the reasoning that would insulate some discretionary determinations from review would have no application to legal or constitutional questions: *cessante ratione legis cessat ipse lex. Zadvydas v. Da-*

vis, 533 U.S. 679, 698 (2001) ("[T]he rationale of a legal rule no longer being applicable, that rule itself no longer applies.").

Finally, the majority rule would be consistent with Congress's statutorily-expressed intent to permit judicial review over all questions of law and constitutional questions, even those arising in the context of discretionary matters. See 8 U.S.C. §§ 1252(a)(2)(B), (D).[5] Even if the Court were not persuaded that the INA's jurisdictional rules preclude the application of general jurisdictional rules, the statutory grant of jurisdiction at § 1252(a)(2)(D) would still be entitled to substantial respect, and would counsel adoption of a legal regime which at least permits review over all such matters.

In the view of Amicus, the Court need not address these matters in order to decide this case. Because a request for equitable tolling is not an appeal to the Board's *sua sponte* authority, the Court need not decide the power of federal courts to review *sua sponte* decisionmaking. The Court should await a case which would actually turn on that question, and after full briefing by the parties, before resolving the issue.

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[5] It is also relevant to note that Congress adopted § 1252(a)(2)(D) in partial response to the fact that presumptions favoring judicial review are at their height when applied to pure questions of law. *St. Cyr*, 533 U.S. at 300, 305, 308. Whatever the virtues of insulating agency exercise of discretion from federal court oversight, that logic does not apply the insulation of legal and constitutional questions. *See* Henry Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 Harv. L. Rev. 1362, 1395-1397 (1953).

III. THE TRADITION OF JUDICIAL REVIEW OVER MOTIONS TO REOPEN IS LONGSTANDING AND IMPORTANT.

The history of federal judicial review in the reopening context illustrates that judicial review has played, and continues to play, an important and continuing role.

A. The History of the Board's Reopening Rules and Ongoing Judicial Review.

Some aspects of the Board's reopening authority are now codified in statute, *see* 8 U.S.C. § 1229a(c)(7), but the residual or *sua sponte* aspect of that authority remains a creature of regulation. 8 C.F.R. § 1003.2(a). The regulatory nature of residual reopening is no bar to federal court review.

The Board has found itself authorized to reopen matters since its inception, before any regulations or statutes were adopted. *See, e.g.*, *Matter of B-*, 1 I. & N. Dec. 47, 49-50 (BIA 1941) (exclusion proceedings reopened for evidence that fraud conviction in Germany was due to "political considerations, to wit: the fact that the defendant was a Jew"); *Matter of T-*, 1 I. & N. Dec. 158, 158 (BIA 1941) (reopening where Mexican farmworker had resided 40 years in United States and had wrongly believed that prior removals precluded good moral character); *Matter of W-*, 1 I. & N. Dec. 154, 156 (BIA 1941) (German refugee found admissible despite expired visa due to delays in sea voyage). Regulations were ultimately promulgated, specifying limitations and requirements for reopening. 26 FED.REG. 12110 (Jan. 22, 1962), codified at 8 C.F.R. § 103.5. Congress codified reopening rules in statute in 1996. *See* 8 U.S.C. § 1229a(c)(7).

Federal courts reviewed reopening decisions in the period before regulations were promulgated. *See, e.g., United States v. Shaughnessy*, 221 F.2d 578, 580 (2d Cir. 1955) (considering retroactive application of statute to prior adultery); *U.S. ex rel. Lee Kum Hoy v. Shaughnessy*, 237 F.2d 307, 312 (2d Cir. 1956) vacated sub nom. *United States ex rel. Lee Kum Hoy v. Murff*, 355 U.S. 169 (1957) (reopening sought to prove that blood testing was required based on racial discrimination against Chinese).

After regulations were promulgated, the federal courts continued to address reopening matters. *INS v. Jong Ha Wang*, 450 U.S. 139, 140-41 (1981) (per curiam) (noting absence of statutory authority for reopening); *INS v. Rios-Pineda*, 471 U.S. 444 (1985); *INS v. Abudu*, 485 U.S. 94, 104-111 (1988); *INS v. Doherty*, 502 U.S. 314, 322-324 (1992); *Stone*, 514 U.S. at 401.

In short, the fact that Congress did not specifically authorize reopening in statute until 1996 was no bar to federal court review then, nor did it deprive courts of the means of undertaking that review or of granting appeals in meritorious cases. The same is true today; the regulatory nature of residual reopening authority is no bar to the exercise of judicial review.

B. Review of Reopening Matters is Important.

Motions to reopen, and judicial review thereof, continue to serve the "important purpose" of "ensur[ing] a proper and lawful disposition" of a removal matter. *Dada v. Mukasey*, 554 U.S. 1, 18 (2008).

Judicial review plays a crucial role in ensuring the fairness and substantive legality of the system, even as to discretionary matters. *United States ex rel. Ac-*

cardi v. Shaughnessy, 347 U.S. 260 (1954); *St. Cyr*, 533 U.S. at 310. It cannot be disputed that removal matters implicate weighty and important interests. *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("[D]eportation is a drastic measure and at times the equivalent of banishment or exile."); *Ng Fung Ho v. White*, 259 U.S. 276, 284 (1922) (Deportation may result in "loss of both property and life; or of all that makes life worth living."); *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893) (Brewer, J., dissenting). Some federal court review over those matters, albeit limited and deferential, is crucial.

CONCLUSION

The Court has no occasion in the instant matter to reach the questions addressed in this brief, because the Fifth Circuit erred in treating equitable tolling matters as decisions issued *sua sponte* and unreviewable by a court of appeals. In any event, however, the Court should not conclude as a blanket matter that *sua sponte* decisions are unreviewable; at the very least, federal courts may review legal and constitutional questions arising in such decisions.

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